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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )

Inquiry Concerning High-Speed )

Access to the Internet Over )

Cable and Other Facilities )

GN Docket No. 00-185

COMMENTS OF THE  
COMMERCIAL INTERNET EXCHANGE ASSOCIATION

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December 1, 2000

No. of Pages rec'd  
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**INTRODUCTION**

The Commercial Internet eXchange Association (CIX) is a trade association that represents 125 Internet Service Provider (ISP) networks that handle approximately 75 percent of the United States' Internet traffic as well as much of the world's backbone Internet traffic.<sup>1</sup> CIX is the world's oldest trade association of ISPs and Internet-related businesses, having been established in 1991 to provide the first commercial access point to the Internet backbone. CIX, by its attorneys, files these comments in response to the Commission's *NOI*, issued on

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<sup>1</sup> The views expressed herein are those of CIX as a trade association, and are not necessarily the views of each individual member.

September 28, 2000, requesting comment on the issues surrounding high-speed Internet service, particularly that which is provided via cable modem services.<sup>2</sup>

The Commission seeks comment on the variety of legal and policy frameworks that might apply to cable modem service (“CMS”) and/or the cable modem platform (the “CMP”), and the implications of adopting a particular framework as it would relate to other high-speed technologies, such as xDSL and the various wireless options.

CIX recommends that the Commission continue to support reasonable, technically feasible, and commercially viable ISP access to broadband transmission facilities. In addition, the Commission’s refusal to regulate ISPs has facilitated the explosive growth of the Internet. The Commission should continue to do so in this proceeding.

## **DISCUSSION**

Independent ISPs have been a primary factor in the proliferation of the Internet. The vast majority of consumers continue to obtain their Internet services from independent ISPs. As CMS and other broadband technologies are deployed, it is critical to preserving the competitiveness in the Internet market that the current choice and diversity of Internet access services to be preserved.

Clearly, CIX strongly supports commercially viable ISP access to all forms of transmission capacity; consumer ISP choice is our paramount objective, and competitively

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<sup>2</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GN Docket No. 00-185, FCC 00-355, (rel. Sep. 28, 2000) (“*NOI*”).

reasonable and technically feasible access to wireline, wireless, and even optical broadband transmission facilities are critical to that objective. The Commission has enacted a number of substantial market-opening regulations that have done much to support these goals with respect to digital subscriber line (DSL) services. CIX recommends that the Commission continue to deliberately and closely monitor the deployment of broadband facilities, the establishment of competition, and the ability of consumers to access their preferred providers, including ISPs and carriers.

Moreover, CIX strongly believes that all Americans have a special right to the benefits of competition and consumer choice with respect to communications carriers, because communications carriers rely so heavily on public rights-of-way and radio spectrum regulation. The specific history of the communications industry dictates that regulations are often required to ensure that consumers can obtain the benefits of competition and consumer choice. These concerns, however, do not extend to ISPs which, though utilizing communications in the provision of Internet service, are not communications common carriers. ISPs have not sought to obtain special public benefits such as access to rights-of-way or access to radio spectrum in a manner comparable to communications carriers, and the ISP industry is vibrantly competitive. Consequently the Commission should be reluctant to impose regulations that will adversely impact ISPs in this proceeding, even if such regulations are required for other aspects of the communications industry.

As a matter of general policy, technological advances affecting the provisioning of transmission capability necessary for high-speed Internet access should not be used as a means for carriers to curtail an ISP's ability to continue to provide their customers with Internet

services. For ISP choice to exist, 1) consumers should be able to choose an independent ISP on terms that are competitive with those of carrier-affiliated ISPs, and 2) independent ISPs should be able to reasonably negotiate for commercially viable connectivity with broadband carriers. As discussed below, there appears to be promising, albeit incomplete, marketplace progress with respect to the formation of private agreements between ISPs and broadband carriers, and CIX is cautiously optimistic that market forces and regulatory oversight together might ensure ISP choice and competitive opportunity. CIX supports the Commission's continued vigilance with regard to broadband access and ISP choice, and believes that such vigilance is important for the further development of Internet-related competition.

#### **The Commission should continue to refrain from enacting regulations affecting Internet Service Providers**

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The Commission has so far determined that broadband capability is being deployed on a reasonable and timely basis, and that there is no compelling need for further regulatory intervention in the broadband market.<sup>3</sup> The Commission, however, continues to actively monitor broadband deployment, and CIX believes that the Commission's vigilance has resulted

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<sup>3</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket No. 98-146, 14 FCC Rcd 2398, at ¶ 101 (1999). See also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, CC Docket No. 98-146, FCC 00-290. Rel. Aug. 2000.

in better behavior by industry participants. While the Commission should not move from vigilance to intervention without sufficient cause, it is important that the Commission continue to remain alert to market changes that may require such intervention.

The Commission previously considered the issue of broadband Internet access in the context of the merger of AT&T and Telecommunications, Inc. ("TCI").<sup>4</sup> That proceeding was colored by a concern that AT&T and TCI, in combination, would dominate the provision of high-speed Internet services, resulting in a loss of competition. The Commission approved that merger without enacting open access conditions, however, citing the nascent emergence of competing high speed Internet access methodologies.<sup>5</sup>

More recently, the Commission's Cable Services Bureau concluded that it "is not persuaded that consumers are at risk of cable establishing a bottleneck monopoly in broadband services in the absence of immediate regulatory action. [C]able is [not] the only viable broadband pipe available in the near term to provide Internet access to the home. As deployment of [digital subscriber line ("DSL")], satellite, and wireless advances in large part spurred by rapid cable modem deployment, consumers will have alternative platforms to use for high-speed data access, telephony, and video services. [T]hese alternative technologies are attracting new

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<sup>4</sup> See *Application for Consent to the Transfer of Control of the Licenses and Section 214 Authorizations from TCI to AT&T*, 14 FCC Rcd 3160, (1999).

<sup>5</sup> *Id.*

subscribers at an exponential rate, and the prices of these new services are falling.”<sup>6</sup> In the year since the Commission issued that statement, alternative forms of broadband, such as DSL, satellite, and new forms of wireless communications have emerged as viable broadband “pipes.”<sup>7</sup> Nonetheless, it is very important that, regardless of the transmission media, consumers should have the opportunity to choose an independent ISP on terms that are competitive with those of carrier-affiliated ISPs.

Finally, the Commission should leave intact its policy of classifying ISPs as information service providers.<sup>8</sup> The Commission defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, and operation of a telecommunications system or the management of a telecommunications service.”<sup>9</sup>

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<sup>6</sup> *A Staff Report to William E. Kennard, Chairman, Federal Communications Commission, On Industry Monitoring Sessions Convened by the Cable Services Bureau*, Broadband Today, at 9, 42 (Oct. 1999).

<sup>7</sup> For example, StarBand, a joint venture between Gilat-To-Home Inc., Microsoft Corp., EchoStar Communications Group, and ING Furman Selz Investments Inc., recently launched its always-on two-way satellite high-speed Internet access system, promising widespread consumer access to transmission speeds of up to 500 kilobits (“kbps”) downstream and 150 kbps upstream from GE-4 and Telstar 7 satellites. See Jim Wagner, *StarBand Launches Internet Via Two-Way Satellite*, InternetNews.com, ISP News, Nov. 6, 2000, at [http://www.internetnews.com/isp-news/article/0,,8\\_504521,00.html](http://www.internetnews.com/isp-news/article/0,,8_504521,00.html).

<sup>8</sup> See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 FCC Rcd 385, 401 ¶ 34 (1999); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536 ¶ 73 (1998).

<sup>9</sup> 47 U.S.C. § 153(20).

It is apparent from the Commission's definition that the provision of the transmission capability, whether labeled telecommunications or CMS, is completely different from the provision of the information service. ISPs are in the business of providing information services. This business is unregulated, and it has thrived as a result.<sup>10</sup> Indeed, the ISP industry is a model of competition; even the largest and most successful ISPs must innovate to remain competitive; ISPs of all sizes are growing organically as well as through acquisition. Small, specialized, and local "mom and pop" ISPs continue to survive, existing on razor-thin margins, often providing Internet service to regions and markets that larger entities simply pass by. It is vital that the Commission refrain from enacting regulations that would burden or otherwise impede the efforts of these innovative and competitive entities.

#### **Market forces are beginning to create a competitive broadband access industry**

In the *NOI*, the Commission specifically notes the development of market-based access initiatives, and the movement of cable operators toward open ISP access.<sup>11</sup> That movement continues, most recently in the form of the agreement between EarthLink, Inc., America Online, Inc., ("AOL") and Time Warner that reportedly will enable EarthLink to offer broadband Internet

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<sup>10</sup> See *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, Office of Plans and Policy ("OPP")

<sup>11</sup> *NOI* at ¶ 37.



access to the 20 million homes currently reached by Time Warner's cable lines.<sup>12</sup> Previously, Time Warner signed a letter of intent with Juno Online Services, Inc. agreeing to carry the ISP on its high-speed cable network.<sup>13</sup> Assuming that the proposed merger of AOL and Time Warner is ultimately completed, the availability of at least three competing ISPs on the AOL Time Warner high-speed cable network will set a competitive threshold against which other broadband services may not be able to compete without providing access to an even wider range of ISPs.

Moreover, a Goldman Sachs analyst recently observed that establishing open access would be likely to increase Time Warner's revenues, and help expand AOL's broadband service beyond the Time Warner system, setting a model for the rest of the cable industry.<sup>14</sup> CIX believes that this indicia of Wall Street support for open access practices is significant, and suggests that market forces may be harnessed to increase ISP choice and competitive access to broadband transmission systems.

Finally, the participants in the broadband access and Internet industries continue to have the opportunity to negotiate and resolve in a private forum the technological and operation issues

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<sup>12</sup> Steven Bonisteel, *AOL/Time Warner's EarthLink Pact Extends FTC Review*, Washtech.com, Nov. 20, 2000, at <http://www.washtech.com>.

<sup>13</sup> Jim Hu, *Juno First In Line for Time Warner Cable Network*, CNET News.com, Jul. 31, 2000, at <http://news.cnet.com/news/0-1005-202-2396729.html>.

<sup>14</sup> Reshma Kapadia, *Open Access Could Help AOL-Time Warner, Goldman Says*, Reuters, Nov. 8, 2000, available at [http://dailynews.yahoo.com/hx/nm/20001108/wr/aol\\_timewarner\\_dc\\_6.html](http://dailynews.yahoo.com/hx/nm/20001108/wr/aol_timewarner_dc_6.html).

associated with open access to broadband systems. At this still-early stage in the development of broadband technologies, the Commission should be wary of undertaking the regulation of technical minutia, such as broadband network architecture and standards.

### **The Commission has an important role in further development of the Internet**

CIX's suggestion that the Commission exercise caution with regard to regulatory intervention in the Internet industry does not mean that the Commission does not have a vital role to play. The Commission has already accomplished much by remaining an interested observer and guardian of the Internet, allowing it to grow freely while benefiting from the Commission's regulation of the communications network facilities without which the Internet could not exist. This proceeding, by demonstrating the Commission's thorough and deliberate consideration of a wide variety of relevant issues before adopting additional regulations, is a further testament to the Commission's role as observer and guardian of the unregulated Internet.

Moreover, should market failures appear, and competition appear threatened, the Commission can restore competitive balance on an individual case basis or by issuing regulations of general applicability, as is most appropriate at that time. In addition, the Commission can work in tandem with other federal agencies, such as the Federal Trade Commission and the Department of Justice, or on its own, through fast-tracked "rocket docket" proceedings to target specific anti-competitive activity and maintain the dynamic and competitive Internet that it has helped to foster.

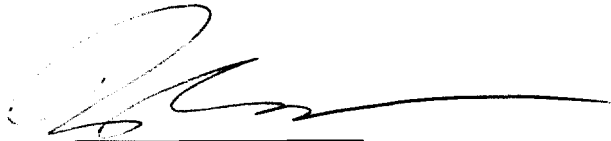
## CONCLUSION

CIX urges the Commission to continue to maintain its vigilance and support for competition in the telecommunications markets. Such competition is fostered by promoting freedom of ISP and carrier choice for consumers, and will be further encouraged by adopting CIX's recommendations. By doing so, the Commission will help to ensure that local facilities are fully opened for competition.

Respectfully submitted,

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I, Mary W. Malone, certify that I have, on this 1<sup>st</sup> day of December, 2000, caused a true and correct copy of the foregoing “Comments of The Commercial Internet Exchange Association” to be hand delivered to:

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